United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-6047

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-6047

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P/S

MARIA A. EISENHAUER, on her behalf and on behalf of her children, FRANCIS X. EISENHAUER and BRIAN F. EISENHAUER,

Appellant,

-against-

DAVID MATHEWS, individually and in his capacity as Secretary of the Department of Health, Education and Welfare,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

R E P L Y B R I E F F O R A P P E L L A N T

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On the Brief

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STATEMENT

The Appellant believes that the Secretary has attempted to blur the nature of this case. This case is not an attack on the Social Security Act or any provision thereof. It involves only a claim by recipients of Social Security survivors insurance, who were reduced to poverty when their benefits were reduced from almost $400 to less than $120 per month (107a), and the legitimacy of competing claims for those benefits.

The Appellant substantially agrees with several fundamental points made in the Secretary's brief. She disagrees only on their application to the facts of her specific case. Appellant agrees whole-heartedly with the Secretary that:

> (t)he Social Security Act is remedial and its humanitarian aims necessitate that it be construed broadly and applied liberally.
> (Appellee's br., p. 11)

and only wishes that the Secretary consistently advanced this position with as much vigor as he does here. Furthermore, Appellant agrees that, in general, the Secretary is not required to consider evidence of a stepchild's actual dependency, but may rely on a finding that a wage earner was living with his stepchildren at his death in satisfaction of the "deemed dependency" provision of §202(d)(4) (id, p. 16). Appellant does not even disagree with the Secretary's assertion that actual support is not always a prerequisite for receiving child's insurance benefits (id, p. 19).

However, the Secretary has totally twisted and exaggerated Appellant's position by suggesting that a decision for the Appellant would place a large class of "statusless" children in peril of being "disinherited" (id, p. 6). First, this action does not purport to seek a broad ruling; it seeks only to restore the benefits which were taken from Appellant and her two children. Second, as discussed below, Appellant believes that the case can be decided on narrow grounds peculiar to the specific facts of this case. Third, this case concerns competing individual claims for limited benefits which must be balanced and, as this Court recently recognized in Frost v. Weinberger, 515 F.2d 57, 65, 67 (2d Cir. 1975), the issues be approached differently than in the usual case which does not involve competing private interests.

I. THE PURPOSE OF THE SOCIAL SECURITY ACT IS TO AID CHILDREN WHO WERE ACTUALLY DEPENDENT UPON THE WAGE EARNER FOR SUPPORT OR WHO HAD A RIGHT TO ANTICIPATE SUCH SUPPORT. SONJA'S CHILDREN BY HER PRIOR MARRIAGE HAD NEITHER.

Throughout his brief, the Secretary makes repeated references to the "remedial" and "humanitarian" aims of the Act and the need for "broad" construction and "liberal" application (Appellee's br., pp. 6, 7, 11, 13, 20). These are objectives with which Appellant is in total agreement. Appellant disagrees, however, with the Secretary's interpretation of those goals in this case. Genuine concern for the "remedial" and "humanitarian" aims of the Social Security Act requires

that the relative situations of all of the wage earner's children be compared in light of the purposes of the Social Security Act.

In Jimenez v. Weinberger, 417 U.S. 628 (1974) a case involving the rights of illegitimate children, the Secretary

> persistently maintained that the purpose of the contested statutory scheme is to provide support for dependants of a wage earner who has lost his earning power (417 U.S. at 633).

Here, the Secretary apparently wishes to have it both ways and insists that:

> Congress intended to provide benefits even to children not actually dependent on the deceased wage earner. (Appellee's br., p. 19)

Appellant agrees. However, the proper test to apply is: actual support or the right to receive support. (See Adams v. Weinberger, __F.2d__, (Dkt. No. 75-7098, 2d Cir. slip op. p. 5453, August 7, 1975).

Proof of this can be found in the very authorities chosen by the Secretary to support his position. (Appellee's br., p. 19) The Secretary points out that the Act provides that natural and adopted children are deemed dependent although the father was neither living with nor contributing to the support of that child (§202(d)(3)). Even if they did not receive actual support, however, natural children, adopted children, and even illegitimate children, have a right to

receive support or an anticipation of support which does not apply to this case.*

Similarly, the legislative history cited by the Secretary (id):

> the revised provisions will better protect those children whose fathers were not able to give them full support...

goes on to add:

> and at the same time will not reduce the force of the father's legal obligation towards his children. (Senate Report, No. 1669, U.S. Code Cong. Service, 81st Cong. 2d Sess. (1950) p. 3316).

Thus Congress clearly intended that there be an obligation of support, if actual support were not possible.

Additional authority for this proposition can be found in the 1965 Report of the Advisory Council on Social Security, ("The Status of the Social Security Program and Recommendations for its Improvement," Washington, D.C. 1965) which refers to "an obligation of support" (p. 67). Similarly, the House-Senate Conference Committee Report on 1965 amendments to the Social Security Act relating to illegitimate children, stated that child's insurance benefits were intended

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*Stepparents generally have no legal duty to support stepchildren. Uhrovick v. Lavine, 43 A.D.2d 481, 352 N.Y.S.2d 529 (3d Dept. 1974) aff'd 35 NY2d 892 (1974). Some state statutes do impose support requirements on stepparents where the natural parents are dead or unable or unwilling to support their children (H. Clark, Domestic Relations, §18.9, p. 659). That is not the case here, however, and in any event no one has suggested that Sonja's "prior" children were actually the deceased's stepchildren.

to be granted "if the father was supporting the child or has a legal obligation to do so" (111 Cong. Record 18387 (July 27, 1965)).

The claimants in this case can be divided into three groups: (a) widow and legitimate children (i.e., Appellant Maria Eisenhauer and her two children); (b) illegitimate children of Sonja Radauscher and the deceased; and (c) Sonja's children by her prior marriage. Of these three groups, only the first two were intended by Congress to receive survivors benefits.

The Secretary does not specifically contest the fact that Sonja's children by her prior marriage received the major part of their support from their own father, Andreas Radauscher, both while the wage earner was alive and after his death (Appellant's br., pp. 26-30, 185a). Moreover, these children did not lose anticipated support from the deceased or the right to support, since they had neither while he was alive. It must be remembered that whether or not these children are "deemed" to be the deceased's stepchildren for purposes of Social Security (see Point III, infra), they had no legal relationship whatsoever to the deceased.

The Secretary's claim that Sonja and her children lost 3/4 of their support when the wage earner died (Appellee'd br., p. 20) is quite misleading. Sonja's "prior" children, the only claimants whose eligibility is being challenged here, lost little if anything by virtue of the wage earner's death. To the extent that other members of Sonja's household

may have lost actual support or the right to support, the Social Security Act has legitimately provided for them. Sonja's illegitimate children by the deceased qualify for benefits under §2[illegible](h)(3)(c) of the Act* and Sonja herself received a lump sum Social Security death benefit (159--162a).

On the other hand, Appellant and her children were actually dependent upon the deceased for support. They not only received support from the deceased, but as the wife and natural children of the deceased, they had an absolute legal right to support. They lost all of this when the wage earner died. After receiving Social Security benefits for two years to replace that support, Appellant and her children lost more than two-thirds of that replacement when Sonja's children were declared eligible (Appellant's br., pp. 7-8). As between these two sets of competing claimants, the purposes of the Social Security Act require that the contested benefits be utilized to provide support for surviving dependents who no longer have the support they received from the

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*Griffin v. Richardson, 346 F.Supp. 1226 (D. Md.) aff'd 409 U.S. 1069 (1972); Davis v. Richardson, 342 F. Supp. 588 (D. Conn.) aff'd 409 U.S. 1069 (1972). Unlike Sonja's "prior" children, the eligibility of the illegitimate children does not depend on the sham marriage ceremony between Sonja and the deceased. That is the reason, which the Secretary finds so mysterious, why Appellant does not challenge the illegitimate children's eligibility. It is not, as the Secretary suggests, because Appellant fears that it would be unconstitutional to apply a "good faith" test to the illegitimate children. (Appellee's br., p. 4, fn. 4a; p. 9) The Secretary has clearly misconstrued this fact which Appellant pointed out in her brief before the district court.

deceased,* rather than to provide benefits for individuals whose primary source of support was not cut off by the wage earner's death and who in addition never had a right to receive support from him.

II. THE "DEEMED DEPENDENCY" PROVISION FOR STEPCHILDREN, §202(d)(4) STANDS REFUTED IN THIS CASE. IT IS NOT AN "IRREBUTABLE PRESUMPTION."

Appellant has no quarrel with the "deemed dependency" provision, §202(d)(4), as it operates in the overwhelming majority of cases. Although stepchildren who satisfy the "living with" requirement may not in all cases have been actually dependent on the deceased, Appellant does not dispute that, in general, stepchildren who satisfy the "living with" requirement are likely to have been actually dependent. For the vast majority of claimants, Appellant agrees, §202(d)(4) does serve the legitimate interests of the Secretary and of claimants: namely of providing benefits to those who are intended beneficiaries of the Social Security Act, while at the same time providing a rule that is relatively easy to apply and avoids the necessity for more complex individual determination. c.f. Weinberger v. Salfi, __U.S.__, 40 U.S.L.W. 4985, 4993-96 (1975). Thus, in

*If Appellant prevails, the benefits which were payable to Sonja's "prior" children will be shared by the Appellant, her two children, and the illegitimate children of Sonja and the deceased. The loss to Sonja's household, therefore, will be slight.

considering whether a claimant has made out a prima facie case, the Secretary may rely on the "deemed dependency" provision and is "not required to consider further evidence of the stepchildren's actual dependency" (Appellee's br., p. 16).

Appellant strongly disagrees, however, with the Secretary's suggestion that this commonsense presumption is "irrebutable" (Appellee's br., pp. 19-20).* Neither the Secretary nor a claimant has any legitimate interest in taking that provision, which can be simply utilized in the overwhelming majority of cases, and treating it as an inviolable principle to be applied even where, as in this case, it is not appropriate.

Furthermore, there are the competing interests of the Appellant to be weighed here, which alter the balance. The true remedial purposes of the Social Security Act is not served in this case by blindly construing §202(d)(4) "in favor of granting benefits to an applicant" (Appellee's br., p. 30). c.f., Frost v. Weinberger, supra. The same construction of §202(d)(4) which would be "liberal" to Sonja's children by her previous marriage, would be unspeakably harsh to Appellant and her children who are precisely the individuals for whom Social Security survivors benefits were intended.

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*At the hearing, the Administrative Law Judge himself treated the "deemed dependency status" as "refutable" (72a).

Appellant believes that the Secretary's "irrebutable presumption or prophylactic rule" analysis and discussion of the Weinberger v. Salfi, supra, line of cases, is inappropriate here (Appellee's br., p. 19). There can be no "prophylactic" purpose for the "deemed dependency" rule, unless the Secretary is seriously suggesting the necessity for a rule which "locks in" children, and provides them with benefits, even after it is established that no policy of the Social Security Act would be served thereby because they have lost neither actual support nor the right to support.

"Irrebutable" presumptions, which operate to exclude individuals from benefits eligibility, or from some other category, have long been constitutionally disfavored. (See, e.g., from Heiner v. Donnan, 285 U.S. 312 (1932) to Vlandis v. Kline, 412 U.S. 441 (1973) and Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974).) They have been justified only rarely and only if they ease a severe administrative problem with little or no sacrifice of equity. Weinberger v. Salfi, supra, 43 U.S.L.W. at 4995-96. Since in this case the salutory purposes of the "deemed dependency" rule are fully served by its operation as a simple presumption, even according to the Salfi analysis, there is no reason to treat the rule as "irrebutable."

To treat the "deemed dependency" rule here as an irrebutable presumption would save no great administrative

effort or expense, and would be grossly unfair to the wage earner's natural children. In this case, contrary to the Secretary's claim, the relevant evidence regarding the "stepchildren's" actual support was "in evidence before the Administrative Law Judge" and was "part of the record upon which he based his decision" (Appellee's br., p. 21). Appellant here maintains only that the Secretary has incorrectly interpreted that evidence.

A ruling for the Appellant would require no further administrative effort or expense by the Secretary in this or in any other case. In any situation in which granting benefits to new applicants would perforce lower the amount payable to pre-established beneficiaries, the first beneficiaries must be given an opportunity to challenge the second claim. See e.g., Frost v. Weinberger. There is, therefore, already a regular hearing procedure whereby the Secretary must examine the evidence in cases in which there are conflicting claims. Even this re-examination procedure is unnecessary in the vast majority of cases which do not involve competing claims.

The mere fact that §202(d)(4) provides in the disjunctive that a stepchild may be deemed dependent if he or she was "living with" or receiving one-half support from the parent does not mean, as the Secretary suggests, that the provision applies even if there is clear proof of no dependency (Appellee's br., p. 19). The remedial purpose of the Social Security Act does not extend to children who suffered neither

loss of actual support nor the termination of a right to support at the wage earner's death.

"Dependency" is a basic statutory condition for eligibility. Section 202(d)(1)(c). The Act and the legislative history make it clear that "dependency" means either actual real dependency or the right to receive support (Point I, supra). The "deemed dependency" provision for stepchildren (§202(d)(4)) is a subsidiary provision by which the basic dependency provision is applied. The fact that under §202(d)(4), a stepchild is permitted to demonstrate dependency by proof that he or she was "living with" or received one-half of his or her support from the deceased, is to say nothing more than that these two factors are common indices of dependency which the Social Security Act deems sufficient to raise a prima facie presumption of dependency. However, "living with" is not the same as "dependent." They are neither literal equivalents nor functional equivalents. The Social Security Act does not function so mindlessly that mere proof by a so-called stepchild that he or she was "living with" the deceased, can conclusively settle the underlying question of dependency, notwithstanding clear evidence that he or she was in fact not dependent on

the wage earner.*

In this case, the "deemed dependency" status under §202(d)(4), if established in the first place (see preceeding footnote), is refuted by "evidence sufficient to support a finding of nonexistence of the presumed fact" (Richardson on Evidence, Ninth Edition, §57). The Appellant has satisfied her burden of proof that Sonja Radauscher's children by her prior marriage to Andreas Radauscher were not dependent upon the wage earner at the time of his death, had no such rights, were in fact dependent on someone else (i.e., their father, Andreas Radauscher), and remained dependent upon that other person after the wage earner's death (Appellant's br., pp. 26-30). If the Administrative Law Judge considered such evidence at all, he either misapplied the law with respect to this evidence, or he disregarded the overwhelming weight of the evidence. In either case, the decision must be reversed. (See Appellant's br., pp. 23-26, and citations therein.)

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*Appellant does not concede that there was adequate proof of "living with," including "exercise of parental control and authority" as required by Regulation 20 C.F.R. §404.1113 (Appellant's br., pp. 30-32). Despite the Secretary's claim to the contrary, Appellant does recognize her burden as proof to rebut a prima facie case (Appellee's br., p. 18, fn. 19). However, all of the papers which Sonja submitted to support the claim for her "prior" children are in the record. On this basis, Appellant believes that the Administrative Law Judge was obliged to rule that Sonja failed to meet her initial burden of proving "living with" including "parental control," that she never established a prima facie case, and that the original decision of the Bureau of Retirement and Survivors Insurance to the contrary was in error.

III. THE SECRETARY'S ARGUMENTS REGARDING THE "CEREMONIAL MARRIAGE" PROVISION IN §216(e) ARE INAPPLICABLE.

The Secretary's brief reacts strongly to Appellant's contention that the "ceremonial marriage" provision of §216(e) was not intended to apply to this case because the parties to the marriage ceremony lacked good faith.* These shrill warnings of broad dire consequences, however, grossly exaggerate the consequences of a ruling for Appellant.

As suggested above, this case can be decided on very narrow grounds. Sonja's prior children do not belong to the class of children which the Social Security Act was intended to benefit; whether or not they appear to meet one of the requirements of §202(d)(4) for "deemed dependency," they were, and are, in fact, dependent on someone else, and do not satisfy the underlying dependency requirement for child's insurance benefits (Points I and II). Moreover, this is one of the rare instances where the usual equities do not apply, and where the importance of accurate analysis of the

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*Sonja's children by her previous marriage were "deemed" to be the stepchildren of the deceased under §216(e), because of a marriage certificate which Sonja and the deceased obtained in Elton, Maryland, even though the deceased was already married (24a). The Secretary appears to suggest that there is a question as to whether Sonja was aware of the wage earner's previous marriage (Appellee's br., p. 7, fn. 6). However, there is in the record a letter from Sonja to the Social Security Administration, which clearly indicates that Sonja knew about the deceased's wife and that she hoped to marry the deceased if he obtained a divorce (181-182a).

children's eligibility is heightened because of the conflicting interests of the Appellant and her children (Point I). Thus it is not necessary for this Court to reach the question of whether the "ceremonial marriage" provision for stepchildren in §216(e) requires "good faith."

In any event, the Secretary is unable to explain away the issue because the notion that "good faith" is an implicit part of the "ceremonial marriage" provision in §216(e) may be inescapable. Although Sonja and the deceased clearly knew that they were going through a sham in obtaining a marriage certificate, Appellant is not suggesting that these particular parties had a fraudulent motive in doing so to obtain Social Security benefits. Nevertheless, the fact remains that, without "good faith," §216(e) would in fact openly countenance fraud in other cases. There is nothing in the Secretary's brief which fundamentally disputes this, and the Secretary points to no other example in the Social Security Act in which the possibility of fraud is so knowingly countenanced.

In suggesting that "good faith" is implied in the "ceremonial marriage" provision of §216(e), Appellant is not asking this Court to "read into §216(e)" a novel notion (Appellee's br., p. 7). Contrary to the Secretary's assertion, the "circumstances of its adoption" do not "strongly suggest that no such requirement was intended" (id, p. 13). If anything, the legislative history suggests that the opposite

is true (Appellant's br., pp. 17-21). Secondly, it would not imply "a major self-evident error in drafting the statute" to conclude that children not be deemed stepchildren of a wage earner on the strength of a sham marriage certificate obtained in bad faith (Appellee's br., p. 15). Appellant has suggested in her brief the reason for the language difference between this ceremonial marriage provision and the one for spouse's benefits, §216(h)(1)(B); namely that the provision for spouses speaks specifically of demonstrating good faith and of finding of bad faith, a proof requirement obviously inapplicable to children (Appellant's br., p. 20).

It is not necessary for this Court to reach the issue of good faith ceremonial marriages as it relates to "deemed" stepchildren. Should it do so, however, the inescapable conclusion is that stripping the ceremonial marriage provision of any pretext of reality or seriousness would have the unintended result of converting a provision intended to supply relief from honest mistake, surprise, or legal technicality, into a loophole so broad as to incorporate complete sham or worse.

IV. THIS COURT CAN AWARD BENEFITS TO THE APPELLANT WITHOUT NECESSITY OF REMAND.

The Secretary argues that it would be appropriate to remand the case for further administrative hearing if this Court reverses the Secretary's decision (Appellee's br., p. 7,

fn. 6). Appellant disagrees. It has been almost three and one-half years since Appellant was notified that the survivors benefits payable to her and her two children were being reduced from almost $400 per month to less than $120 per month (107a). Further delay would mean serious hardship to Appellant and her children. As noted above, there is already prima facie evidence in the record that Sonja's children by her prior marriage were not dependent on the deceased, and that the marriage ceremony between Sonja Radauscher and the deceased was in bad faith.

Should this Court reverse the Secretary on either of these two grounds, the Appellant will have satisfied her burden in these proceedings; namely to rebut, prima facie, the eligibility of Sonja's "prior" children. She will have shifted the burden of proof to Sonja, who has never been a party to these proceedings. Nevertheless, if the Secretary is correct and a remand is required, Appellant alone would bear the burden of reduced benefits, even though she will have already done all that is required of her to restore her benefits.

In the interim, which could take many months if not years, the Appellant and her children are entitled to restoration of their benefits. Presumably, the Secretary would then notify Sonja of these events and afford her with the opportunity to make whatever showing required of her.

CONCLUSION

For the reasons stated in this reply brief and in Appellant's main brief, the decision of the Secretary should be reversed.

Dated: New York, New York
October 15, 1975

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AFFIDAVIT OF SERVICE BY MAIL

Index No. 75-6047

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ELIZABETH MELENDEZ, being duly sworn, deposes and says:

Deponent is not a party to the above action, is over 18 years of age and resides at 3 Haven Plaza, New York, New York.

That on the 15 day of October , 1975, deponent served the within REPLY BRIEF FOR APPELLANT

upon J. CHRISTOPHER JENSEN, Assistant United States Attorney, Attorney for Appellee, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York

the address designated by said attorney for that purpose by depositing a true copy of same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Elizabeth Melendez
ELIZABETH MELENDEZ

Sworn to before me this
15 day of October 1975.

Angelina Mitchell
ANGELINA MITCHELL
Notary Public, State of New York
No. 31-2731265
Qualified in New York County
Commission Expires March 30, 1977